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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES MOTHON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it permissible for a federal court to allow the government to engage in pre-trial discovery depositions in a criminal matter pursuant to Fed. R. Crim. P. 15(a) despite the express statement in the advisory note to Rule 15(a) that its provisions not be used for the purpose of pre-trial discovery?

PARTIES TO THE PETITION

The only party to this petition is petitioner Charles Mothon. In the Court below, Mothon's co-defendants-appellants were as follows: General Electric Company; Schenectady Turbine Services, Ltd.; Twombly, Inc.; Robert Naples and Hoyt P. Steele. Except for defendant Twombly, Inc., it is petitioner Mothon's belief that no other parties to this action in the Court below desire to join in this petition.

The respondent is the United States of America.

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Petitioner, Charles Mothon, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 16, 1982.

OPINIONS BELOW

The June 16, 1982 opinion of the Third Circuit Court of Appeals has not yet been reported officially. A copy of the Third Circuit's slip opinion is annexed to this Petition as Appendix A.

That aspect of the October 1, 1980 unreported oral opinion of the United States District Court for the District of New Jersey pertaining to the Rule 15 issue is annexed to this Petition as Appendix C.

JURISDICTION

The judgment of the Third Circuit Court of Appeals reversing petitioner's convictions and ordering a new trial was entered on June 16, 1982, and a copy thereof is annexed to this Petition as Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL RULE INVOLVED

Federal Rule of Criminal Procedure 15(a) provides:

> (a) *When Taken*. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

STATEMENT OF THE CASE

On September 4, 1980, a federal grand jury sitting in Newark, New Jersey returned a seven-count indictment against petitioner Mothon, and his co-defendants:

General Electric Company ("GE"); Schenectady Turbine Services, Ltd.; Twombly, Inc.; Robert Naples and Hoyt P. Steele. The indictment charged, in essence, that the three individuals and three corporate defendants conspired and carried out a scheme lasting from May, 1973 to June 30, 1976 to pay a bribe to one Carlos Velasquez Toro, an official of a publicly-owned utility of the Puerto Rico Water Resources Authority ("PRWRA"), in return for Toro's use of his influence to obtain for GE a contract to construct a power generating plant for the PRWRA in Puerto Rico. On February 11, 1981, a jury sitting in the United States District Court for the District of New Jersey found all of the defendants guilty on all but Count six of the seven-count indictment.

On June 16, 1982, the Third Circuit Court of Appeals issued a judgment (Appendix B) and opinion (Appendix A): (1) reversing the conviction of Robert Naples on all counts; (2) reversing the convictions under Counts 2, 3 and 5 for all of the other defendants on the grounds that the District Court should have entered directed verdicts of acquittals on these counts; and (3) setting aside the convictions of the defendants on Counts 1, 4 and 7 and remanding for a new trial on these counts.[1]

This petition for certiorari is limited solely to the question of whether the Third Circuit erred in ruling that it was proper for the government to take depositions in Bermuda and Canada pursuant to Fed. R. Crim. P. 15(a) even though the government was not in a position to satisfy the procedural prerequisites for the taking of Rule 15 depositions and the primary purpose for taking

1. The seven-count indictment referred to above was consolidated for purposes of trial with a one-count indictment that charged only defendant Twombly, Inc. with violating the Travel Act, 18 U.S.C. §1952. Twombly, Inc. was convicted on this one-count indictment and this conviction was affirmed by the Third Circuit on appeal. *See* Appendix A.

these depositions was to engage in pre-trial discovery. Although the Third Circuit reversed the convictions of the petitioner, the Rule 15 issue raised by this petition is not moot because of the remand on Counts 1, 4 and 7 for a new trial. The following facts relate to the Rule 15 issue.[2]

Following the return of the September 4, 1980 indictment, the government filed a motion on September 22, 1980 to take the depositions of certain foreign nationals residing in Bermuda, Canada and England pursuant to Fed. R. Crim. P. 15(a) and a request for International Judicial Assitance pursuant to Fed. R. Crim. P. 57(b) and Fed. R. Civ. P. 28(b). The sole factual basis for the government's Rule 15(a) request was an affidavit by prosecutor Joseph Covington. A copy of Covington's affidavit is annexed hereto as Appendix D. In this affidavit the government was forced to indicate that it had never spoken directly to any of the persons it wished to depose and, as a consequence, the government was not able to set forth any facts the deponents would testify about, nor how or why their testimony was so material to the case as to justify the taking of a Rule 15 deposition. Based on that single affidavit, the government sought to take depositions: (1) in Canada of Michael Candy; Bruce Forcey and Warren Kuk; (2) in Bermuda of William Cox; Michael B. Collins; the custodian of records for the Bermuda National Bank; an officer of the Bermuda Monetary Authority, and the Registrar of Companies; and (3) in England of Douglas Field.

All the defendants vigorously objected to the taking of the depositions on the ground, *inter alia*, that the government had failed to meet the rigid factual and legal prerequisites for the Court's exercise of discretion to permit depositions under Fed. R. Crim. P. 15(a). The thrust

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2. The facts of the entire case are set forth in detail in the opinion of the Third Circuit annexed hereto as Appendix A.

of these objections was that the government had no knowledge of the content of the testimony of any of the deponents and that the depositions were actually for the purpose of pre-trial discovery, an impermissible use of a Rule 15(a) deposition.

Defendants argued that the government's candid concession that it was unaware of what the deponents might say was dispositive of the fact that the government was actually asking for pre-trial discovery. The District Court granted the motion nonetheless. In so ruling from the bench, the District Court essentially reasoned that because the deponents were foreign nationals who refused to talk to the government, circumstances justified a relaxing of Rule 15's prerequisites:

> b. The second required showing under Rule 15(a) is that the witness' testimony be material to the issues in the case. This is a most difficult judgment for a court to make prospectively, without the opportunity to review a sworn statement of the proposed witness. In the typical Rule 15 application, a witness who may be unavailable *for trial* will logically be available at some time before trial. Thus, the party requesting leave to conduct a Rule 15 deposition will have taken a statement of the witness' testimony. Rule 15 proceedings would be applied for simply as a way of preserving that witness' testimony, because that witness would be unavailable at trial because of death, severe illness or other such circumstances.
>
> Here, on the other hand, we have prospective witnesses who have been either totally unavailable before trial or available only at a previous letters rogatory proceeding. The fact that they are foreign nationals adds an element to the facts before this Court that is simply not addressed by the cases the

> Court has reviewed. The relevancy of the proposed testimony is described in Mr. Covington's affidavit. I am satisfied that this is not a proposed fishing expedition. It appears to me that I should apply the reasoning of the Court in *United States v. Bronston*, 321 F. Supp. 1269, 1271 (S.D.N.Y. 1971), where it was stated that "the mere fact that a necessary witness is a foreign national domiciled abroad and beyond the subpoena power of the Court does not mandate an order pursuant to Rule 15, (but) it is an impelling consideration." We are persuaded that the almost complete unavailability of these proposed witnesses absent letters rogatory issued pursuant to a Rule 15 order is an "impelling consideration" in assessing the government's showing of materiality.

Appendix C at 40a-41a.

Thus, the District Court in effect ignored Rule 15 and its express prohibition against permitting pre-trial discovery in criminal cases. In affirming the District Court's decision on this ruling, the Third Circuit adopted the District Court's approach and held that in light of the unusual circumstances, the government did not have to satisfy Rule 15's normal standards:

> We recognize that Fed. R. Crim. P. 15, which provides for the taking of depositions in criminal cases, does not authorize their use as means of discovery; but we cannot agree with appellants that the depositions at issue were used as discovery tools. Appellants emphasize that the government could not demonstrate to the district court the materiality of the proposed testimony. In view of the government's inability to gain access to the proposed deponents, however, we agree with the district court that under the extremely unusual circumstances of

> this case it could not insist on the usual showing of materiality. In the ordinary case, where the witnesses reside in the United States, the witness who will be unavailable for trial will be available sometime prior to the deposition so that the parties will know with reasonable certainty the materiality of the proposed testimony. We believe that the district court appropriately accepted a reduced showing of materiality to avoid denying important evidence to all the parties, including the appellants, the court, and the jury.

Appendix A at 30a (footnote omitted).

As demonstrated below, despite the unusual circumstances of this case, both the District Court and the Third Circuit improperly ignored the provisions of Rule 15(a) that this rule not be used to permit pre-trial discovery.

REASONS FOR GRANTING THE WRIT

The decision of the Third Circuit to permit depositions in a criminal matter pursuant to Fed. R. Crim. P. 15 where the effect was to permit the government to engage in impermissible pre-trial discovery is in direct conflict with the advisory note to Rule 15 and presents an important question of federal law that should be resolved by this court.

This case presents an important question of federal law relating to the question of whether it is permissible for a federal court to allow the government to engage in pre-trial discovery in a criminal matter pursuant to Fed. R. Crim. P. 15(a) despite the express statement in the advisory note to Rule 15 that it not be used for the purpose of pre-trial discovery. As set forth below, the decisions of the District Court and the Third Circuit to ignore this prohibition against pre-trial discovery on the reasoning that this case presented "extremely unusual circumstances" was unwarranted and amounted to an ad hoc judicial amendment of the standards governing the issuance of Rule 15 depositions.

A. *The Applicable Law: Elements of The Movant's Burden of Proof Under Rule 15(a).*

Fed. R. Crim. P. 15(a) provides in relevant part:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time or place. . . .

Two important features of this language warrant initial discussion. First, Rule 15(a) does not authorize discovery depositions, but only authorizes depositions of the moving party's own witnesses to preserve their testimony for use at trial. Numerous courts have held that depositions in a criminal case properly have no discovery function. *See, e.g., United States v. Mann*, 590 F.2d 361, 365 (1st Cir. 1978); *United States v. Rich*, 580 F.2d 929, 933-934 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978); *United States v. Adcock*, 558 F.2d 397, 406 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977); *United States v. Steffes*, 35 F.R.D. 24 (D. Mont. 1964). As the Notes of the Advisory Committee on the 1975 Amendment to Rule 15 explain, the Rule's "principal objective is the preservation of evidence for use at trial. *It is not to provide a method of pretrial discovery* nor primarily for the purpose of obtaining a basis for later cross-examination of an adverse witness." (emphasis added).

Second, the rule authorizes the Court to order that the deposition of the moving party's own witness be taken so that the witness's testimony may be preserved for use at trial only when "due to exceptional circumstances" the "interest of justice" so requires. This exacting standard, which indicates that depositions should be sparingly allowed, must be rigorously applied because "allowing depositions too freely would create the risks that parties . . . would try to use depositions in lieu of live testimony at trial in contravention of the spirit of the Sixth Amendment." *United States v. Mann, supra*, 590 F.2d at 365.

Mindful of the rule's limited purpose and function, the courts have established a series of prerequisites for a party seeking to take a deposition pursuant to Rule

15(a).[3] In the first place, the movant must show that the witness will not be available to appear at trial, despite all reasonable efforts to secure his appearance. *United States v. Mann, supra*, at 366; *United States v. Rich, supra*, at 933-34. In addition, the movant must show that the proposed deponent's expected testimony is material and necessary to prevent a failure of justice. These requirements serve the dual function of helping to establish "exceptional circumstances" and ensuring that the deposition is being sought to preserve the testimony of the movant's own witness, not for discovery.

There are numerous examples of these prerequisites. In *United States v. Wilson*, 601 F.2d 95 (3d Cir. 1979), the Court ruled that the defendants should have been allowed to take the deposition of a fugitive from justice not subject to extradition because the defendants submitted an affidavit from the proposed deponent, which "established that his testimony was relevant and, if believed, would have been exculpatory to some extent." 601 F.2d at 98. In contrast, the defendants in *United States v. Mitchell*, 385 F. Supp. 1190 (D.D.C. 1973),

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3. Three of these prerequisites, that the prospective witness will be unable to attend the trial, that the witness' testimony is material, and that it is necessary to take the witness' deposition in order to prevent a failure of justice, were explicitly contained in Rule 15(a) before it was amended in 1975. Although Congress substituted the phrase "exceptional circumstances" in 1975, that language, as Congress knew and intended, had been judicially defined in terms of the three requirements spelled out in the pre-1975 version of Rule 15(a). *United States v. Singleton*, 460 F.2d 1148, 1153-1154 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973). *See* 8 Moore's Federal Practice, §15.03[1] (1980). Cases subsequent to the 1975 amendment have confirmed that the pre-1975 Rule 15(a) requirements are implicit in the "exceptional circumstances" standard. *E.g., United States v. Rich*, 580 F.2d 929, 933 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978). In the District Court the government concurred in this interpretation. *Memorandum of the United States in Support of its Motion for Leave to Take Depositions*, 1-2.

aff'd sub nom. United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977), were refused authorization to take President Nixon's deposition because Nixon's expected testimony was "cumulative," not "indispensable," and because "[t]here has been no showing by way of statement, affidavit, or otherwise from Mr. Nixon that he would, in fact, testify along the lines the defendants have predicted." 385 F. Supp. at 1193. *Accord*, *United States v. Bello*, 532 F.2d 422, 423 (5th Cir. 1976). Similarly, in *United States v. Ausmeier*, 5 F.R.D. 395, 396 (E.D.N.Y. 1946), the Court denied defendants' motion under Rule 15 for an order authorizing the taking of certain depositions in Germany because the movants had not discussed with the witnesses or their representatives what testimony they would give in the event their depositions were taken.

In summary, if the prosecution moves for an order authorizing a deposition under Rule 15(a), it must submit an affidavit or other evidence from the proposed deponent sufficient to permit the Court to make a judgment as to the "exceptional circumstances" and "interest of justice" requirements of Rule 15. The judgment as to the extent of the government's need for the deposition evidence obviously cannot be made in a vacuum. The government must indicate what the prospective deponent would say and why that evidence is crucial to the case. The fact that the government submits an affidavit to the effect that a deponent might have relevant information is not enough.

B. ***Deficiencies in the Government's Showing***

The affidavit of prosecutor Covington (Appendix D) was the government's sole factual basis for its Rule 15 request. As the following analysis shows, Covington's affidavit failed to satisfy the requirements of Rule 15(a)

as to each of the following witnesses.[4] In essence, Covington's affidavit only suggests that because the deponents occupied positions that brought them into contact with the defendants' business transactions there is a possibility that the deponents might be able to supply some information that would be relevant to the case. However, this type of showing, it is submitted, only reaffirms the petitioner's basic position: that the government was engaged in pre-trial discovery in the hope it would uncover inculpatory evidence.

1. *Michael Candy*

Covington's affidavit states that he was advised by counsel for the Bank of Nova Scotia that Michael Candy "is an employee of the Bank of Nova Scotia, residing in Toronto, who during 1974 and 1975 had been working as a bank manager at the Bermuda National Bank." Appendix D at 43a-44a. The bank counsel further advised Covington that Candy "was prepared to testify that he recalled knowing Charles Mothon and Carlos Velazquez Toro while working at the Bermuda National Bank." (*Id.*) This was the full extent of the showing of materiality.

The government clearly did not justify its request to depose Michael Candy under the standards of Rule 15(a). There was no statement by Michael Candy, his representative, or even by Covington, of what Candy would testify to if his deposition were taken, other than that he knew Mothon and Toro. This falls far short of a showing that Candy's expected testimony was material and necessary to prevent a failure of justice. That Candy

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4. The testimony of each of the following witnesses was critical to the government's case and will be similarly critical at the retrial of Counts 1, 4 and 7.

knew Toro and Mothon while he worked at the Bermuda National Bank certainly does not incriminate any of the defendants. The government failed to specify in any way what relevant information is alleged that Mr. Candy had, and how such information was essential to the prosecution's case. The government was in fact seeking to take a discovery deposition, a procedure unauthorized by Rule 15(a) and improper in a criminal case.

2. *Bruce Forcey*

The government's request to depose Bruce Forcey was similarly infirm. Covington's affidavit stated that he had been advised that Bruce Forcey succeeded Michael Candy as manager at the Bermuda National Bank in August 1975 and that "[b]ank records reveal that on August 19, 1975, Mr. Forcey caused a certificate of deposit belonging to Turbo Electric Equipment Ltd. in the amount of $165,800.23 to be cashed before its maturity date." Appendix D at 44a.

Once again, the government was seeking an impermissible discovery deposition. Although Covington's affidavit stated that Forcey was manager of the Bermuda National Bank and that bank records indicated that he caused the specified certificate of deposit to be cashed, it did not state what Forcey's testimony would be regarding the alleged cashing of the certificate of deposit or any other matters. Indeed, when Forcey ultimately was deposed in Canada, he testified that he had no recollection of the August 19, 1975 transaction referred to in Covington's affidavit. Consequently, the District Court was in no position to determine whether Forcey's testimony would be essential to the prosecution's case and necessary to prevent a failure of justice, or, on the other hand, irrelevant, cumulative, or helpful to the defense. Accordingly, the government failed to discharge its burden under Rule 15(a) of showing that "exceptional circum-

stances" made it "in the interest of justice" for Forcey's testimony to be taken and preserved for use at trial.

3. *William Cox*

As to William Cox, a British citizen and a member of the Hamilton, Bermuda law firm of Cox and Wilkenson, Covington's affidavit stated that Cox "appears as a director of both Turbo Electric Equipment, Ltd. and Power Equipment Ltd.," that Cox "previously testified in the matter of *United States v. Twombly, Inc.*, CR 80-73, that he knew Charles Mothon as the individual who directed the affairs of Turbo Electirc Equipment, Ltd.," and that Cox had recently advised the government "that he still had some minute books and other records of Power Equipment, Ltd." Appendix D at 46a.

The government's showing in support of its request to depose Cox was deficient on familiar grounds. There was no representation of what Cox would testify to and why that testimony was so material to the prosecution's case that its preservation was necessary to prevent a failure of justice. All that was shown was that Cox knew defendant Mothon, that Cox may have held directorships in Turbo Electric Equipment, Ltd. and Power Equipment, Ltd., and that he may have been in possession of some records of Power Equipment, Ltd.

4. *The Bermuda Bank Records*

Covington's affidavit failed to show what transactions the bank's records depicted, when they occurred, and how they bore on the government's case. In short, the government's motion for leave to take the deposition of the custodian of records of the Bermuda National Bank failed to show how the bank's records were material and essential to the prosecution's case. Accordingly, the motion should have been denied.

CONCLUSION

The government's motion for leave to take depostions in three foreign countries was without foundation in law. The government is charged with the determination of facts before it secures an indictment. After an indictment has been returned, the government may conduct limited discovery pursuant to Fed. R. Crim. P. 16. *Rule* 15, however, expressly forbids the government to take pre-trial discovery. Nevertheless, the District Court and the Third Circuit erroneously relieved the government of its burden under Rule 15 and impermissibly sanctioned pre-trial discovery. This ruling was incorrect as a matter of law and presents a significant issue of federal law that merits the granting of this petition to review the judgment of the Third Circuit.

Respectfully submitted,

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